

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

KATHRYN MARIE MORGAN,

Plaintiff,

v.

ANDREW M. SAUL, Commissioner
of Social Security,¹

Defendant.

Case No. SACV 19-0002-AS

MEMORANDUM OPINION AND ORDER OF
REMAND FOR AWARD OF BENEFITS

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY
ORDERED that this matter is remanded for the Commissioner to
calculate and award benefits to Plaintiff.

PROCEEDINGS

On January 2, 2019, Plaintiff filed a Complaint seeking review
of the Commissioner's denial of Plaintiff's application for a

¹ Andrew M. Saul, Commissioner of Social Security, is
substituted for his predecessor. See 42 U.S.C. § 405(g); Fed. R.
Civ. P. 25(d).

1 period of disability and disability insurance benefits ("DIB"),
2 under Title II of the Social Security Act. (Dkt. No. 1). On May
3 29, 2019, Defendant filed an Answer and the Administrative Record
4 ("AR"). (Dkt. Nos. 13-14). The parties have consented to proceed
5 before a United States Magistrate Judge. (Dkt. Nos. 9-10). On
6 November 11, 2019, the parties filed a Joint Stipulation ("Joint
7 Stip.") setting forth their respective positions regarding
8 Plaintiff's claim. (Dkt. No. 21). The Court has taken this matter
9 under submission without oral argument. See C.D. Cal. C. R. 7-15.

10 11 **BACKGROUND**

12
13 On February 16, 2011, Plaintiff, formerly employed as a
14 customer service clerk and office manager (see AR 275, 284), filed
15 a DIB application alleging a disability onset date of June 1, 2009.
16 (AR 261-62). Plaintiff's application was denied initially on March
17 29, 2011 (AR 193-98), and on reconsideration on May 13, 2011. (AR
18 202-06).

19
20 On May 24, 2012, following a hearing (AR 123-43),
21 Administrative Law Judge ("ALJ") Milan Dostal issued a decision
22 denying Plaintiff's application. (AR 173-81). On August 12, 2013,
23 the Appeals Council remanded the case to the ALJ. (AR 186-89).
24 After another hearing (AR 144-67), ALJ Joseph P. Lisiecki, III,
25 issued a decision on March 19, 2014, finding Plaintiff not disabled
26 and denying the application. (AR 15-35).

1 The Appeals Council then denied a request for review (AR 1-
2 6), and Plaintiff filed a complaint in this Court seeking review
3 of the Commissioner's decision. (AR 830-32; see Morgan v. Colvin,
4 Case No. SACV 16-0305-AS). On October 3, 2016, the Court remanded
5 the matter for further proceedings. (AR 809-23).

6
7 On remand, ALJ Lisiecki held a hearing on October 3, 2017,
8 and received testimony from Plaintiff, who was represented by
9 counsel, and from Vocational Expert ("VE") Jaye Stutz. (See AR
10 791-804). On November 17, 2017, the ALJ issued a decision again
11 finding Plaintiff not disabled and denying her application. (AR
12 769-83).

13
14 On November 3, 2018, the Appeals Council denied Plaintiff's
15 request to review the ALJ's decision. (See AR 752-58). Plaintiff
16 now seeks judicial review of the ALJ's November 17, 2017 decision,
17 which stands as the final decision of the Commissioner. See 42
18 U.S.C. § 405(g).

19
20 **SUMMARY OF ADMINISTRATIVE DECISION**

21
22 The ALJ applied the requisite five-step process to evaluate
23 Plaintiff's case. At step one, the ALJ found that Plaintiff met
24 the insured status requirements through December 31, 2012, and had
25 not engaged in substantial gainful activity from June 1, 2009, her
26 alleged disability onset date, to December 31, 2012, her last
27 insured date. (AR 774). At step two, the ALJ found that Plaintiff
28 had the following severe impairments: depression;

1 fibromyalgia/myofascial pain syndrome; and lumbar degenerative
2 disc disease, status-post L5-S1 fusion and hardware removal. (AR
3 774).

4
5 At step three, the ALJ determined that Plaintiff's impairments
6 did not meet or equal a listing found in 20 C.F.R Part 404, Subpart
7 P, Appendix 1. (AR 775). The ALJ found that Plaintiff was mildly
8 limited in understanding, remembering, and applying information,
9 but moderately limited in social interaction and in concentration,
10 persistence, and pace. (AR 775-76).

11
12 Next, the ALJ determined that Plaintiff had the Residual
13 Functional Capacity ("RFC")² to perform sedentary work³ with the
14 following additional limitations:

15
16
17 ² A Residual Functional Capacity is what a claimant can still
18 do despite existing exertional and nonexertional limitations. See
19 20 C.F.R §§ 404.1545(a)(1), 416.945(a)(1). An RFC assessment
20 requires the ALJ to consider a claimant's impairments and any
21 related symptoms that may "cause physical and mental limitations
22 that affect what [he] can do in a work setting." 20 C.F.R.
23 §§ 404.1545(a)(1), 416.945(a)(1). In determining a claimant's RFC,
the ALJ considers all relevant evidence, including assessments made
by consultative examiners, state agency physicians, and medical
experts. 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3); see also id.
§§ 404.1513(c), 416.913(c).

24 ³ "Sedentary work involves lifting no more than 10 pounds at
25 a time and occasionally lifting or carrying articles like docket
26 files, ledgers, and small tools. Although a sedentary job is
27 defined as one which involves sitting, a certain amount of walking
28 and standing is often necessary in carrying out job duties. Jobs
are sedentary if walking and standing are required occasionally
and other sedentary criteria are met." 20 C.F.R. §§ 404.1567(a),
416.967(a).

1 [Plaintiff can] occasionally lift and carry 10 pounds;
2 frequently lift and carry less than 10; stand and walk
3 (with normal breaks) for a total of 2 hours of an 8-hour
4 workday; sit (with normal breaks) for a total of 6 hours
5 of an 8-hour workday; postural limitations all
6 occasional, no climbing ladders, ropes, scaffolds; avoid
7 extremes of cold; and simple tasks, object oriented, so
8 no work with the general public, can be around the
9 general public but not required to interact with the
10 general public.

11
12 (AR 777).

13
14 To make this finding, the ALJ considered Plaintiff's
15 allegations, her treatment history, her work history and daily
16 activities, and the medical opinions and evidence in the record.
17 (AR 777-81). The ALJ generally found that Plaintiff's "medically
18 determinable impairments could reasonably be expected to cause the
19 alleged symptoms," but her "statements concerning the intensity,
20 persistence and limiting effects of these symptoms" were "not
21 entirely consistent" with the evidence in the record. (AR 778).
22 The ALJ noted that Plaintiff's alleged inability to work was due
23 to pain and lack of concentration. (AR 778). The ALJ also noted
24 that Plaintiff's "statements about her daily activities indicate[d]
25 she spends most of her time resting[,], which primarily consist[ed]
26 of lying down as she also testifie[d] that sitting cause[d] her
27 pain symptoms to increase." (AR 779). The ALJ noted that
28 Plaintiff underwent lumbar spinal fusion surgery in December 2008,

1 but continued to complain of pain despite consistently normal
2 examination findings. (AR 778). The ALJ observed that Plaintiff's
3 treatment otherwise consisted of "a complex regimen of opiates,
4 muscle relaxers, and antidepressants," along with some epidural
5 and trigger point injections. (AR 778, 780). However, the ALJ
6 found "little to no evidence of recommendations for other
7 conservative treatment modalities including physical therapy,
8 chiropractic care, acupuncture, massage therapy, or pool therapy,"
9 which, according to the ALJ, are "frequently used when individuals
10 present with and are diagnosed with fibromyalgia or myofascial pain
11 syndrome." (AR 779).

12
13 The ALJ gave "little weight" to each of the medical sources
14 in the record. (AR 779-81). The ALJ noted that the one treating
15 physician, Dr. Arthur Zepeda, M.D., essentially opined that
16 Plaintiff was unable to work because her pain and depression caused
17 limitations in sitting, standing, walking, and concentration that
18 would prevent her from completing a full eight-hour day and would
19 require her to miss several days per month. (AR 780). However,
20 the ALJ gave Dr. Zepeda's opinions "very little weight" because he
21 found them inconsistent with Plaintiff's normal examinations and
22 her lack of "other treatment modalities" such as massage therapy,
23 chiropractic care, and acupuncture. (AR 780-81). The ALJ gave
24 "little weight" to the opinions of the non-examining state agency
25 consultants, as well as the orthopedic surgeon who testified as a
26 medical expert, because their opinions were not restrictive enough,
27 and did not adequately account for all of Plaintiff's impairments.
28 (AR 779-80).

1 The ALJ did not expressly rely on any portion of the medical
2 opinions in the record as a basis for the RFC determination.
3 Instead, after reviewing all the evidence, the ALJ gave the
4 following explanation for the RFC:

5
6 Overall, [Plaintiff] suffers from physical and mental
7 impairments that limit her ability to perform all work
8 activities at all exertional levels. [Plaintiff]
9 routinely and consistently presents with normal physical
10 signs and only mild progression over three years of her
11 lumbar spine disc disease based on the objective
12 findings. Yet, she does continue to need medical
13 intervention for pain symptoms. Balancing the subjective
14 complaints with the objective signs and findings results
15 in the conclusion [Plaintiff] is still capable of work,
16 but only at the sedentary level as that exertional level
17 allows for more sitting than standing and walking.
18 Additionally, when accounting for [Plaintiff's] mental
19 impairments, while the file lacks specific mental health
20 treatment records, it is reasonable to limit the
21 claimant's stress by reducing her interactions with the
22 public to only those that are incidental to her work.
23 Also, she is required to perform no more than simple
24 tasks as those allow for repetitive performance while
25 requiring little judgment or decision making, which
26 could be problematic given the impact her symptoms have
27 on her ability to sustain concentration. As such,
28

1 [Plaintiff] has the capacity for the [RFC] detailed
2 above given all of the factors discussed.
3
4 (AR 781).
5

6 At step four, the ALJ found that Plaintiff was unable to
7 perform any past relevant work. (AR 781). Based on Plaintiff's
8 RFC, age, education, work experience, and the VE's testimony, the
9 ALJ determined, at step five, that there are jobs that exist in
10 significant numbers in the national economy that Plaintiff could
11 perform, including "Document Preparer" and "Film Touchup
12 Inspector." (AR 782). Accordingly, the ALJ found that Plaintiff
13 was not under a disability, as defined in the Act, from June 1,
14 2009, to December 31, 2012, her last date insured. (AR 782).
15

16 STANDARD OF REVIEW

17

18 This Court reviews the Administration's decision to determine
19 if it is free of legal error and supported by substantial evidence.
20 See Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012).
21 "Substantial evidence" is more than a mere scintilla, but less than
22 a preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.
23 2014). To determine whether substantial evidence supports a
24 finding, "a court must consider the record as a whole, weighing
25 both evidence that supports and evidence that detracts from the
26 [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d 1033,
27 1035 (9th Cir. 2001) (internal quotation omitted). As a result,
28 "[i]f the evidence can support either affirming or reversing the

1 ALJ's conclusion, [a court] may not substitute [its] judgment for
2 that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882
3 (9th Cir. 2006).

4 5 **DISCUSSION**

6
7 Plaintiff claims that the ALJ erred by (1) failing to properly
8 consider the medical evidence contained in the opinions of her
9 treating pain management physician, Dr. Zepeda, in assessing her
10 RFC; (2) finding Plaintiff's subjective complaints not credible;
11 and (3) presenting a "flawed hypothetical" to the VE. (See Joint
12 Stip. at 4-27). After consideration of the record as a whole, for
13 the reasons stated below, the Court finds that the Commissioner's
14 decision must be reversed because the ALJ materially erred in
15 evaluating Plaintiff's statements and her treating physician's
16 opinions. Furthermore, the Court finds that remand for an
17 immediate calculation and award of benefits is warranted.

18 19 **A. The ALJ Erred in Discrediting the Treating Physician's Opinion** 20 **and Plaintiff's Statements**

21 22 **1. Relevant Evidence**

23
24 Plaintiff testified in 2011 that after working for over twenty
25 years, she was now unable to work due to her severe pain, and was
26 "let go" from her most recent job, as an office manager, in June
27 2009 because she "was making too many mistakes and wasn't actually
28 able to do it." (AR 127-28). She described pain in her back,

1 along with widespread pain in her neck, legs, and arms. (AR 129).
2 She stated that the pain requires her to spend about two hours in
3 bed in the morning and another hour-and-a-half to two hours in bed
4 in the afternoon. (AR 153). She stated that she takes medications
5 for pain and depression, including Norco, Lyrica, and Cymbalta.
6 (AR 129, 132). She acknowledged that her medications help, but
7 she still has pain. (AR 129). She also relieves the pain with
8 rest, baths, and a heating pad, and she wears a back brace "all
9 the time." (AR 133). At the most recent hearing, in 2017, she
10 testified she rests as much as possible, and lies down for about
11 three or four hours total between 9 a.m. and 5 p.m., as "[l]ying
12 down is one of the only things that gives [her] relief." (AR 796-
13 97).

14
15 Plaintiff estimated that she can stand for ten minutes at a
16 time, sit for thirty minutes, and walk for thirty minutes. (AR
17 132). She stated that she could lift a gallon of milk (AR 135,
18 795-96), and is able to cook, but mainly uses the microwave. (AR
19 130). Plaintiff noted that she needs to use a railing to get in
20 and out of the shower. (AR 308). She also testified that she is
21 able to read, but not as long as she used to because of difficulty
22 concentrating. (AR 131). She watches television for about two
23 hours a day. (AR 131). She stated that she is able to do laundry
24 if her children help her, and she can do some vacuuming and "very
25 light" gardening, but cannot sweep the floor. (AR 134). She can
26 drive, but only for five minutes, to pick up or drop off her
27 children at school right down the street from her home. (AR 130).

1 She is able to shop for groceries once a week by "lean[ing] on the
2 cart." (AR 134-35, 308).

3
4 Dr. Zepeda provided Plaintiff with pain management treatment
5 on a monthly basis throughout the relevant period, beginning in
6 August 29, 2009. (See AR 387, 712). He continued to treat her at
7 least through May 24, 2017. (AR 1056). Dr. Zepeda diagnosed
8 Plaintiff with fibromyalgia, chronic pain syndrome, and depression.
9 (AR 531). He noted that Plaintiff's primary symptoms were diffuse
10 widespread myofascial pain, along with fatigue. (AR 531, 713-14).

11
12 Regarding fibromyalgia, Dr. Zepeda opined that Plaintiff met
13 the American College of Rheumatology criteria, with clinical
14 findings of tenderness in multiple areas of the body. (AR 712).
15 Dr. Zepeda stated that Plaintiff experienced chronic pain in
16 multiple areas of her body, such as the lumbosacral spine, cervical
17 spine, thoracic spine, shoulders, hips, legs, and
18 knees/ankles/feet. (AR 713-14). He noted that Plaintiff had
19 "constant aching pain with frequent episodes of exacerbation." (AR
20 714). On October 3, 2011, Dr. Zepeda rated Plaintiff's pain as 4-
21 8 on a 10-point pain scale, and her fatigue as 6-8 on a 10-point
22 scale. (AR 531). On December 26, 2013, he rated her pain as
23 moderately severe, 8 on a 10-point scale (AR 714). Dr. Zepeda
24 opined that Plaintiff's symptoms and functional limitations were
25 consistent with documentation of her condition (AR 713), and were
26 present since August 2009 (AR 717). He further opined that
27 Plaintiff is not a malingerer. (AR 534, 714).

1 Dr. Zepeda submitted multiple assessments of Plaintiff's
2 limitations, in 2011 and 2013. (See AR 387, 522-28, 531-35, 712-
3 17, 1011-12). In the assessments, Dr. Zepeda opined that in an
4 eight-hour workday, Plaintiff could sit no more than two hours
5 total, stand/walk no more than two hours total, and could
6 occasionally lift and carry less than ten pounds and rarely up to
7 twenty pounds. (AR 387, 532). He also stated that Plaintiff
8 required unscheduled fifteen-minute rest breaks every two to four
9 hours, among other limitations. (AR 716). He opined that Plaintiff
10 would miss work more than three times a month due to her impairments
11 or treatment. (AR 526, 535, 716).

12
13 In an October 2011 evaluation of Plaintiff's mental
14 impairments, Dr. Zepeda noted Plaintiff's diagnosis of depression,
15 with symptoms including depressed mood, decreased energy,
16 generalized persistent anxiety, difficulty thinking or
17 concentrating, easy distractibility, memory impairment, and sleep
18 disturbance. (AR 522-23). Dr. Zepeda opined that Plaintiff was
19 "unable to meet competitive standards" in her ability to (1)
20 remember work-like procedures; (2) maintain attention for two-hour
21 segments; (3) maintain regular attendance and be punctual within
22 customary, usually strict tolerances; (4) perform at a consistent
23 pace without an unreasonable number and length of rest periods;
24 (5) understand and remember detailed instructions; and (6) carry
25 out detailed instructions. (AR 524-25). He further noted that
26 Plaintiff's depression exacerbated her fibromyalgia symptoms. (AR
27 525).

1 Dr. Zepeda stated that Plaintiff was treated with lumbar spine
2 injections and "a complex range of medications that consist[ed] of
3 opiates (fentanyl patches, norco), muscle relaxants (Skelaxin) and
4 antidepressants (Cymbalta) to manage chronic lower back pain and
5 fibromyalgia pain." (AR 1011). Dr. Zepeda also stated that
6 Plaintiff had "further utilized physical modalities such as
7 massage, physical therapy and TENS unit⁴ without sustained
8 benefit." (Id.). Dr. Zepeda opined that despite some response to
9 her treatment of pain medications and injections, Plaintiff
10 remained unable to function "at a normal capacity." (Id.). He
11 also noted that Plaintiff experienced medication side-effects,
12 including drowsiness, dizziness, and cognitive issues. (Id.).
13

14 Aside from Dr. Zepeda's opinions, which were based on his
15 long-term treatment of Plaintiff's pain conditions, the only other
16 relevant opinions in the record are those of non-examining sources
17 whose assessments are significantly less restrictive. (See AR 779-
18 80). State agency medical consultants Kenneth Glass, M.D., and H.
19 Han, M.D., who reviewed a limited record, opined that Plaintiff
20 could sit for six hours, stand and walk for four hours, and lift
21 and carry twenty pounds occasionally and ten pounds frequently,
22 among other limitations. (AR 452-58, 516-17). Medical expert Eric
23 Schmitter, M.D., an orthopedic surgeon, testified that Plaintiff
24 could sit for six hours, with no standing or walking restrictions,
25

26 ⁴ "Transcutaneous electrical nerve stimulation (TENS or TNS)
27 is the use of electric current produced by a device to stimulate
28 the nerves for therapeutic purposes." <[https://en.wikipedia.org/
wiki/Transcutaneous_electrical_nerve_stimulation](https://en.wikipedia.org/wiki/Transcutaneous_electrical_nerve_stimulation)> (last visited
Dec. 3, 2019).

1 and could lift and carry twenty pounds frequently and ten pounds
2 occasionally. (AR 150). However, Dr. Schmitter admitted that
3 these limitations did not account for Plaintiff's fibromyalgia
4 because he lacked expertise on that impairment. (AR 150-51).
5 Finally, state agency psychological consultant Paul Cherry, Ph.D.,
6 and psychiatric consultant P.M. Balson, M.D., opined that Plaintiff
7 has only mild mental limitations. (AR 441-51, 515-16).

8
9 **2. Applicable Law for Weighing Treating Medical Opinions**
10 **and Claimant Statements**
11

12 In an ALJ's assessment of medical opinions, a treating
13 physician's opinion is generally afforded the greatest weight,
14 though it is not binding on an ALJ with respect to the existence
15 of an impairment or the ultimate determination of disability.
16 Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir.
17 2004); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).
18 "Generally, a treating physician's opinion carries more weight than
19 an examining physician's, and an examining physician's opinion
20 carries more weight than a reviewing physician's." Holohan v.
21 Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); see also Lester v.
22 Chater, 81 F.3d 821, 830 (9th Cir. 1995). The weight given a
23 treating physician's opinion depends on whether it is supported by
24 sufficient medical data and is consistent with other evidence in
25 the record. 20 C.F.R. § 416.927(c)(2); see Trevizo v. Berryhill,
26 871 F.3d 664 (9th Cir. 2017). When a treating physician's opinion
27 is not controlling, it is weighted based on factors such as the
28 length of the treatment relationship and the frequency of

1 examination, the nature and extent of the treatment relationship,
2 supportability, consistency with the record as a whole, and
3 specialization of the physician. 20 C.F.R. § 416.927(c)(2)-(6).
4 If a treating or examining doctor's opinion is contradicted by
5 another doctor, the ALJ must provide "specific and legitimate
6 reasons" for rejecting the opinion. Orn v. Astrue, 495 F.3d 625,
7 632 (9th Cir. 2007); Lester, 81 F.3d at 830-31.

8
9 When assessing a claimant's credibility regarding subjective
10 pain or intensity of symptoms, the ALJ must engage in a two-step
11 analysis. Trevizo, 871 F.3d at 678. First, the ALJ must determine
12 if there is medical evidence of an impairment that could reasonably
13 produce the symptoms alleged. Garrison, 759 F.3d at 1014. If the
14 claimant satisfies this first step, and there is no evidence of
15 malingering, the ALJ must provide specific, clear and convincing
16 reasons for rejecting the claimant's testimony about the symptom
17 severity. Trevizo, 871 F.3d at 678 (citation omitted); see also
18 Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) ("[T]he ALJ
19 may reject the claimant's testimony regarding the severity of her
20 symptoms only if he makes specific findings stating clear and
21 convincing reasons for doing so."); Robbins v. Soc. Sec. Admin.,
22 466 F.3d 880, 883 (9th Cir. 2006) ("[U]nless an ALJ makes a finding
23 of malingering based on affirmative evidence thereof, he or she
24 may only find an applicant not credible by making specific findings
25 as to credibility and stating clear and convincing reasons for
26 each."). "This is not an easy requirement to meet: The clear and
27 convincing standard is the most demanding required in Social
28 Security cases." Garrison, 759 F.3d at 1015 (citation omitted).

1 In discrediting the claimant's subjective symptom testimony,
2 the ALJ may consider inconsistent statements, unexplained or
3 inadequately explained failure to seek treatment or to follow a
4 prescribed course of treatment, and the claimant's daily
5 activities. Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014).
6 The ALJ also may consider the observations of treating and
7 examining physicians regarding, among other matters, the functional
8 restrictions caused by the claimant's symptoms. Smolen, 80 F.3d
9 at 1284. However, it is improper for an ALJ to reject subjective
10 testimony based "solely" on its inconsistencies with the objective
11 medical evidence presented. Bray v. Comm'r of Soc. Sec. Admin.,
12 554 F.3d 1219, 1227 (9th Cir. 2009) (citation omitted). The ALJ
13 must support the credibility determination with findings that are
14 "sufficiently specific to permit the court to conclude that the
15 ALJ did not arbitrarily discredit claimant's testimony."
16 Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation
17 omitted).

18 19 **3. Analysis**

20
21 The ALJ discredited Plaintiff's statements and gave "very
22 little weight" to the treating opinions of Dr. Zepeda, because the
23 ALJ found them to be (1) inconsistent with Plaintiff's
24 examinations, which tended to reveal normal strength, sensation,
25 and range of motion; and (2) inconsistent with Plaintiff's course
26 of treatment, which was based on prescription medications and
27 injections, but lacked "other conservative treatment modalities"
28 such as physical therapy or acupuncture. (AR 778-81). The ALJ

1 also gave "little weight" to the other medical opinions, from non-
2 examining sources, because they reviewed a limited record and did
3 not sufficiently account for Plaintiff's impairments. (AR 779-
4 80). Rather than expressly rely on testimony or opinions to
5 determine Plaintiff's RFC, the ALJ generally "[b]alanced the
6 subjective complaints with the objective signs and findings" to
7 conclude that Plaintiff could engage in "sedentary" work, but
8 limited to six hours of sitting and two hours of standing or walking
9 in an eight-hour workday, among other accommodations. (AR 777).
10 However, the ALJ failed to provide legally sufficient reasons for
11 discounting Plaintiff's statements and Dr. Zepeda's opinions, and
12 his conclusion that Plaintiff can sustain employment is not
13 supported by substantial evidence.

14
15 (a) Examination Evidence
16

17 The ALJ discounted Plaintiff's statements and Dr. Zepeda's
18 opinions, as noted, because they reflected physical limitations in
19 conflict with Plaintiff's normal examination findings. However,
20 fibromyalgia - one of the main impairments for which Plaintiff was
21 treated, and which the ALJ found to be severe - is a recognized
22 medical condition that cannot be demonstrated by diagnostic tests
23 or other objective medical evidence. Revels v. Berryhill, 874 F.3d
24
25
26
27
28

1 648, 656-57 (9th Cir. 2017); Benecke v. Barnhart, 379 F.3d 587,
2 589-90 (9th Cir. 2004); see also SSR 12-2p.⁵

3
4 Fibromyalgia is "a rheumatic disease that causes inflammation
5 of the fibrous connective tissue components of muscles, tendons,
6 ligaments, and other tissue." Benecke, 379 F.3d at 589. Typical
7 symptoms include "chronic pain throughout the body, multiple tender
8 points, fatigue, stiffness, and a pattern of sleep disturbance that
9 can exacerbate the cycle of pain and fatigue associated with this
10 disease." Id. at 590. Those suffering from fibromyalgia have
11 normal muscle strength, sensory functions, and reflexes. Revels,
12 874 F.3d at 656. Because "there are no laboratory tests to confirm
13 the diagnosis," fibromyalgia is assessed "entirely on the basis of
14 patients' reports of pain and other symptoms." Benecke, 379 F.3d
15 at 590; see Revels, 874 F.3d at 657 (a "diagnosis of fibromyalgia
16 does not rely on X-rays or MRIs"). The Agency has provided two
17 sets of criteria for diagnosing the condition, based on the 1990
18 American College of Rheumatology Criteria for the Classification
19 of Fibromyalgia and the 2010 American College of Rheumatology
20 Preliminary Diagnostic Criteria. See SSR 12-2p, at *2-3; Revels,
21 874 F.3d at 656-57. These criteria basically involve finding that
22 the patient has experienced widespread pain, the manifestation of
23 particular symptoms associated with fibromyalgia - such as fatigue,

24
25 ⁵ The Agency issued SSR 12-2p in 2012, recognizing fibromyalgia
26 as a valid "basis for a finding of disability." SSR 12-2p at *2.
27 Prior to this ruling, there was considerable debate about whether
28 a fibromyalgia impairment could render a claimant disabled for
Social Security purposes. See Revels, 874 F.3d at 656 (describing
SSR 12-2p as a "sea-change" in the law).

1 depression, or the presence of certain points of tenderness - and
2 the absence of other disorders that would account for the pain.
3 See SSR 12-2p, at *2-3; Revels, 874 F.3d at 656-57. The Agency's
4 regulations also urge ALJs to consider "a longitudinal record
5 whenever possible" because "the symptoms of fibromyalgia 'wax and
6 wane,' and . . . a person may have 'bad days and good days.'" Revels, 874 F.3d at 657 (quoting SSR 12-2p)).
7

8
9 Here, Dr. Zepeda diagnosed Plaintiff with fibromyalgia and
10 stated that Plaintiff met the American College of Rheumatology
11 criteria, including widespread pain and clinical findings of
12 tenderness in multiple areas of the body. (AR 712-14). Having
13 examined and treated Plaintiff for this condition regularly over
14 several years, Dr. Zepeda provided informed opinions of Plaintiff's
15 physical and mental limitations resulting from the condition.
16

17 Despite Dr. Zepeda's long-term treatment of Plaintiff, and
18 the accepted facts about how fibromyalgia is manifested, diagnosed,
19 and treated, the ALJ frequently remarked in the decision that
20 Plaintiff's statements and Dr. Zepeda's opinions conflicted with
21 the normal examination findings. The ALJ stated, for example, that
22 the limitations in Dr. Zepeda's letter from January 6, 2014, were
23 "directly contradicted by the notations of range of motion within
24 normal limits without pain from a treatment note dated March 20,
25 2013." (AR 780). The ALJ discredited Dr. Zepeda's assessments
26 overall for failing to "explain how [Plaintiff] is able to be
27 observed with fully normal physical signs, how the objective
28 findings showed only mild progression of her disc disease in three

1 years, and yet her pain is so limiting that it precludes the ability
2 to engage in work for more than half of a normal 8-hour workday."
3 (AR 780). The ALJ thus failed to recognize that examinations
4 showing normal muscle strength, tone, stability, and range of
5 motion "are perfectly consistent with debilitating fibromyalgia."
6 Revels, 874 F.3d at 666. Medical evidence such as this, which is
7 known to be consistent with fibromyalgia, was not a valid basis
8 for the ALJ to reject any portion Plaintiff's statements, Dr.
9 Zepeda's opinions, or the limitations caused by Plaintiff's
10 disabling pain.

11
12 (b) Course of Treatment

13
14 The ALJ also discounted Plaintiff's statements and Dr.
15 Zepeda's opinions because he found them to be inconsistent with
16 Plaintiff's course of treatment. A conservative course of
17 treatment may discredit a claimant's allegations of disabling
18 symptoms. See, e.g., Parra v. Astrue, 481 F.3d 742, 750-51 (9th
19 Cir. 2007) (treatment with over-the-counter pain medication is
20 "conservative treatment" sufficient to discredit a claimant's
21 testimony regarding allegedly disabling pain). However, the ALJ
22 did not find that Plaintiff's treatment was conservative. Indeed,
23 there is no question that Plaintiff's treatment - which consisted
24 of strong prescription pain medications such as Norco and fentanyl,
25 along with epidural and trigger point injections - was not
26 conservative. See Revels, 874 F.3d at 667 (fibromyalgia treatment
27 consisting of a variety of prescription medications and steroid
28 injections is not conservative); Trejo v. Berryhill, 2018 WL

1 3602380, at *15 (C.D. Cal. July 25, 2018) ("Fibromyalgia is treated
2 with medications and self-care, rather than surgery or other more
3 radical options." (quotations and citations omitted)).

4
5 Instead, the ALJ faulted a lack of conservative treatments -
6 specifically, treatments such as "physical therapy, chiropractic
7 care, acupuncture, massage therapy, or pool therapy." (AR 779).
8 According to the ALJ, these "other conservative treatment
9 modalities" are "frequently used when individuals present with and
10 are diagnosed with fibromyalgia or myofascial pain syndrome." (AR
11 779). The ALJ thus discredited Dr. Zepeda's opinion because the
12 physician did not "explain why" these other treatments were
13 "excluded while [Plaintiff was] given more and more medications
14 for her reported pain symptoms." (AR 780).

15
16 This is not a valid basis to discount Plaintiff's statements
17 or the opinions of the physician who treated Plaintiff regularly
18 for years. The ALJ did not provide any support for his finding
19 that the absence of these "other conservative treatment modalities"
20 undermined claims of debilitating fibromyalgia. Neither party has
21 pointed to any credible support for such a finding, nor has the
22 Court been able to locate any. As noted, prescription medications
23 and injections are recognized fibromyalgia treatments. See Revels,
24 874 F.3d at 667; Trejo, 2018 WL 3602380, at *15. Moreover, the
25 ALJ incorrectly found that Plaintiff had not utilized other
26 treatments. To the contrary, Dr. Zepeda did in fact state that
27 Plaintiff had "further utilized physical modalities such as
28 massage, physical therapy and TENS unit," but "without sustained

benefit." (AR 1011). The treatment notes corroborate this. (See AR 352, 391-93, 396, 417, 427, 437, 494, 549, 566, 582, 593, 603, 617, 639, 684, 733).

B. Remand for an Immediate Award of Benefits Is Warranted

For the reasons stated above, the ALJ failed to provide valid, adequate reasons to discount Plaintiff's statements and Dr. Zepeda's treating opinions.⁶ Having largely rejected these reliable sources, on faulty grounds, without any other reliable medical assessment of Plaintiff's limitations, the ALJ reached a decision that is not based on substantial evidence. See Lingenfelter v. Astrue, 504 F.3d 1028, 1040 (9th Cir. 2007) ("Because the ALJ did not provide clear and convincing reasons for excluding Lingenfelter's pain and symptoms from his assessment of Lingenfelter's RFC, substantial evidence does not support the assessment. Nor does substantial evidence support the ALJ's step-five determination, since it was based on this erroneous RFC assessment." (citations omitted)). Remand is therefore warranted. This Court has discretion to remand either for further administrative proceedings or, if certain elements are met, for an

⁶ Although Dr. Zepeda's opinions conflicted with the other medical opinions, the ALJ gave "little weight" to each of those opinions and did not expressly rely on any of them in rejecting Dr. Zepeda's opinions or Plaintiff's statements, or in determining Plaintiff's RFC. (AR 779-81). Moreover, these other opinions were from non-examining medical sources, which "cannot by [themselves] constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." Revels, 874 F.3d at 664 (quoting Lester, 81 F.3d at 831).

1 immediate award of benefits. Harman v. Apfel, 211 F.3d 1172, 1175-
2 78 (9th Cir. 2000).

3
4 The Ninth Circuit has stated that a remand for benefits is
5 warranted "only in 'rare circumstances.'" Treichler v. Comm'r of
6 Soc. Sec. Admin., 775 F.3d 1090, 1100 (9th Cir. 2014) (quoting
7 Moisa v. Barnhart, 367 F.3d 882, 886 (9th Cir. 2004)). Such
8 circumstances are present only where the following elements are
9 satisfied: (1) "the ALJ has failed to provide legally sufficient
10 reasons for rejecting evidence, whether claimant testimony or
11 medical opinion"; (2) "the record has been fully developed, [and]
12 there are [no] outstanding issues that must be resolved before a
13 determination of disability can be made"; and (3) the record as a
14 whole, with the relevant testimony or evidence credited as a matter
15 of law, "leaves not the slightest uncertainty as to the outcome of
16 [the] proceeding." Id. at 1100-01 (internal quotations and
17 citations omitted).

18
19 Here, as to the first element, the Court has determined that
20 the ALJ failed to provide legally sufficient reasons for
21 discounting Plaintiff's statements and her treating physician's
22 opinions. Indeed, this is the second time that this Court has
23 remanded Plaintiff's case due to the ALJ's failure to give valid
24 reasons to discount Dr. Zepeda's opinions. (See AR 809-23; Morgan,
25 Case No. SACV 16-0305-AS, Dkt. Nos. 16-17 (remanding for further
26 administrative proceedings)).

1 The Court thus proceeds to the second element and the question
2 of "whether further administrative proceedings would be useful."
3 See Treichler, 775 F.3d at 1103-04. To determine this, the Court
4 "consider[s] whether the record as a whole is free from conflicts,
5 ambiguities, or gaps, whether all factual issues have been
6 resolved, and whether [Plaintiff's] entitlement to benefits is
7 clear under the applicable legal rules." Id. (citing Moisa, 367
8 F.3d at 887). In this matter, the record is complete, and nothing
9 remains to be resolved by further administrative proceedings. Dr.
10 Zepeda's opinions are generally consistent with Plaintiff's
11 testimony, as well as Plaintiff's work history, daily activities,
12 and treatment, and do not conflict with the objective medical
13 evidence, for the reasons discussed above. The contrary
14 assessments of non-examining medical sources in the record were
15 based on a very limited record and/or failed to adequately credit
16 Plaintiff's documented fibromyalgia, and were thus appropriately
17 discredited by the ALJ. (AR 779-80). Moreover, the improperly
18 rejected limitations provided in Dr. Zepeda's opinions clearly
19 establish that Plaintiff is disabled and entitled to benefits for
20 the period at issue. Ample VE testimony supports this. At three
21 administrative hearings before an ALJ, including the most recent
22 hearing on October 3, 2017, a VE was presented with a hypothetical
23 based on Dr. Zepeda's opinions, and the respective VEs testified
24 that no jobs would be available for a person with those opined
25 limitations. (AR 140-42, 166, 802-03).

26
27 Accordingly, because the record as a whole, with Plaintiff's
28 testimony and Dr. Zepeda's opinions credited as a matter of law,

1 "leaves not the slightest uncertainty as to the outcome of [the]
2 proceeding," remand for an immediate award of benefits is
3 warranted. Treichler, 775 F.3d at 1101; see also Revels, 874 F.3d
4 at 665 ("Because the VE testified that a claimant with the physical
5 limitations outlined in Dr. Nolan's medical opinion would be unable
6 to do any full-time work, Dr. Nolan's opinion 'alone establishes
7 that [Revels] is entitled to benefits.'" (quoting Lingenfelter,
8 504 F.3d at 1041 n.12)); Ellen G. v. Saul, 404 F. Supp. 3d 1261,
9 1268-69 (C.D. Cal. 2019) (remanding for award of benefits because
10 record unambiguously showed that plaintiff would be found disabled
11 if improperly discounted medical opinion were credited as true);
12 Rose v. Berryhill, 256 F. Supp. 3d 1079, 1092 (C.D. Cal. 2017)
13 (same); Knorr v. Berryhill, 254 F. Supp. 3d 1196, 1220 (C.D. Cal.
14 2017) (same, and noting that "remanding for the ALJ to reconsider
15 this evidence, which the ALJ already had an opportunity to review,
16 would simply be allowing the ALJ to have a second bite at the
17 apple.").

18 19 CONCLUSION

20
21 For the foregoing reasons, the decision of the Commissioner
22 is REVERSED, and the matter is REMANDED for the Commissioner to
23 calculate and award benefits to Plaintiff.

24
25 LET JUDGMENT BE ENTERED ACCORDINGLY.

26 Dated: January 10, 2020.

27 _____/s/
28 ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE